Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1977

NO. 77-312

RUSSELL P. BARBER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Russell P. Barber, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit in the entitled case.

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (Appendix A, App. 1) are not reported. The judgment of the Court of Appeals (Appendix B, App. 5) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered July 27, 1977. No petition for rehearing was filed. No extension of time for filing a petition for certiorari was requested or received. The jurisdiction of this Court is invoked under 28 USC § 1254 (1).

QUESTIONS PRESENTED

This Petition presents three important questions relating to the interpretation of 18 USC 659, a statute dealing with thefts from interstate or foreign shipments.

The first question raised is whether there was delivery in this case where the common carrier transported the goods in question to the consignee, Ford Motor Company, at the designated place of delivery and made a tender of delivery, which tender the Government contends was refused because of the present inability of the consignee to unload the shipment. Petitioner contends that a proper tender, refused by a consignee, constitutes delivery under the bill of lading and terminates the interstate aspect of the shipment. Alternatively, Petitioner claims that delivery was effected when the carrier, pursuant to the consignee's instructions, deposited the unlocked semi-trailer holding the goods in question onto Ford property which was surrounded by Ford fences and guarded by Ford employees.

The second question relates to the time when a Sec. 659 theft can be deemed to be completed. The question raised in both the District Court and the Court of Appeals by Petitioner was whether asportation is an element of the proscribed offense, both Courts holding that asportation is an element. Every previous Court which considered the question has held that asportation is *not* an element of a Sec. 659 offense. Petitioner was admittedly not present at the time of the theft in question and he argues that if the theft was complete before he became involved, he could not be guilty of aiding and abetting the already completed crime.

The third question raised by Petitioner is whether Sec. 659 creates an unconstitutionally discriminatory classification denying to those prosecuted thereunder due process of law contrary to the 5th Amendment to the United States Constitution. Sec. 659 provides that "A judgment of conviction or acquittal on the merits under the laws of any state shall be a bar to any prosecution under this section for the same act or acts." Thus, persons accused of theft of goods traveling in interstate commerce may be subject to prosecution both by a State and the Federal Government should the Federal prosecution precede the State prosecution. Conversely, that same accused party may not be prosecuted under Sec. 659 if the State prosecution precedes the Federal prosecution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

18 USC 2 provides:

> "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> "(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

The provisions of 18 USC 659 provide in pertinent part:

> "Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, station house, platform or

> depot, or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property; or
>
> "Whoever buys or receives or has in his possession any such goods or chattels knowing the same to have been embezzled or stolen; or
>
> . . .
>
> "To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made. The removal of property from a pipeline system which extends interstate shall be prima facie evidence of the interstate character of the shipment of the property.
>
> "A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts. Nothing contained in this section shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this section operate to the exclusion of State laws on the same subject matter, nor shall any provision of this section be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this section or any provisions thereof."

STATEMENT OF THE CASE

Petitioner, Russell P. Barber, was charged with a single offense of having aided and abetted in the theft of goods constituting an interstate shipment valued in excess of $100, contrary to the provisions of 18 USC 659. He waived trial by jury and was convicted by the Honorable James P. Churchill, District Judge. The Court of Appeals affirmed (Appendix B).

On April 16, 1974, Ernest Williams, a truck driver for Shippers Dispatch Company, drove a Shippers Dispatch trailer, which originated in Chicago, Illinois, from a freight yard in Detroit, Michigan, to the Ford Assembly Plant in Dearborn, Michigan. The grounds surrounding the Ford Assembly Plant are completely fenced and the gates into and out of the plant manned by Ford security guards. Petitioner, Russell P. Barber, was employed by Ford as a security guard.

The Shippers Dispatch trailer was loaded with 2,880 air compressing units, to be used in Ford vehicles. After securing admission to the plant premises through the Ford gates, driver Williams took the load to the office of the Ford Assembly Plant receiving clerk, turned over three copies of the "pro bill", or shipping documents, and tendered the load to the Ford receiving clerk who told Williams that the compressors could not be unloaded at that time. Under the terms of the bill of lading, the unloading was to be accomplished by Ford employees. The Ford receiving clerk instructed Williams to take the trailer and leave it in a nearby trailer parking area on Ford premises, known as the bullpen. The trailer was

unlocked. Driver Williams deposited the trailer in the bullpen, detached the tractor from the trailer and returned to the premises of his employer.

On the Ford premises several independent companies are permitted by Ford to operate as "switchers". That is, these companies, for a fee paid by carriers delivering goods to Ford, will deliver trailers from the bullpens on Ford property to the Ford loading docks and vice-versa. Lloyd Witherite was working as a switcher for Associated Truck Lines on the day in question.

Lloyd Witherite testified that after he arrived on the Ford premises on April 16, 1974, to work the afternoon shift, he became aware of the shipment left by driver Williams by checking the pro bills left by Mr. Williams with the Ford receiving clerk, Mr. Witherite having access to the clerk's desk. Witherite then telephoned one Stanley Rimar, who agreed to buy the air compressors from Witherite.

Later that evening, Lloyd Witherite attached an Associated Truck Lines tractor to the Shippers Dispatch trailer left by driver Williams, drove the tractor and trailer approximately one mile to Gate 6 and prevailed upon Petitioner, Russell P. Barbar, to let him through the Ford gates. Mr. Witherite testified that he gave Petitioner $200 on the following day. Witherite testified that at no time prior to the time when he arrived at Gate 6 with the Shippers Dispatch trailer attached to the Associated tractor did he talk to Petitioner regarding the theft, nor did Petitioner know what was on the trailer.

The superseding indictment was filed charging Petitioner with aiding and abetting in the theft of an interstate shipment from a storage facility. Co-defendants Witherite and Rimar were charged with both the theft and possession. No conspiracy was ever charged.

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REASONS FOR ALLOWING THE WRIT

(a)

The Goods Were Not in Interstate Commerce When Stolen

The lower Courts and all counsel, both for the Government and the various defendants, involved in this matter appear to this writer to be in agreement with the proposition that the interstate aspect of the shipment terminates upon delivery of that shipment. Cases supporting this proposition decided under 18 USC 659 are:

O'Kelley v. U. S., 116 F. 2d 966 (8th Cir. 1941).

Winer v. U. S., 228 F. 2d 944 (6th Cir. 1956).

U. S. v. Yoppolo, 435 F. 2d 625 (6th Cir. 1970).

See, also, *Gulf, C. & S. F. R. Co. v. Texas*, 204 U. S. 403, 27 S. Ct. 360, 51 L. Ed. 540 (1907).

Cases holding that delivery is completed upon tender of delivery include:

General American Tr. Corp. v. Indiana Harbor Belt R. Co., 191 F. 2d 865 (7th Cir. 1951).

Dohrmann Hotel Supply Co. v. Owl Transfer & S. Co., 143 P. 2d 441 (St. C. Wash. (1943)).

Keystone Motor Freight Lines v. Brannon-Signaigo C. Co., 115 F. 2d 736 (5th Cir. 1940).

See also the dissenting opinion in *Winer v. U. S.*, supra.

The prosecution introduced the bill of lading into evidence, as permitted by Sec. 659, to establish the interstate character of the shipment and then proceeded to argue throughout the lower Courts proceedings that the question of delivery is not to be determined by the provisions of the bill of lading, under which the rights and duties of the consignor and the carrier are set forth with specificity, or under the carrier's tariffs which are incorporated in the bill of lading, but that the question of delivery is to be determined on an ad hoc basis by a court or a jury without regard to the terms of the bill of lading and the carrier's tariffs. Petitioner submits that if there is delivery under the contract between the consignor and the carrier, the interstate aspect of the shipment perforce terminates. No other test could possibly pass constitutional muster.

The District Court held that the goods were in interstate commerce so long as they were sitting on a trailer waiting to be unloaded. The Court then stated that "they (the goods) would have been in interstate commerce until they were backed up to that dock to unload." (Appendix A). The difficulty with the District Court's interpretation of the time when interstate commerce terminates is that the proposition that interstate commerce terminates when a load is backed up to the dock for unloading is unsupported by statute, it is unsupported by previous Court decisions, and it is unsupported by the private contract of the carrier and the consignor. It should be kept

in mind that the consignee is not party to the contract of delivery and that if, by its actions, the consignee may extend the coverage of the interstate theft statute to a time when it actually permits a carrier to bring goods to its dock, then, even though the consignor and the carrier agree that the carrier's liability as a carrier would terminate upon its transportation and tender of the goods at a specified point, the consignee, who is not party to the contract, can under the District Court's reasoning and ruling impose upon the carrier additional duties and greater liability than those to which the carrier agreed and which the carrier in this case actually performed.

The goods in this case were admittedly transported to the one and only place in the world where the carrier was legally obligated to deliver those goods. The act of tender of delivery could only be made at the office of the Ford receiving clerk and the act of acceptance or rejection of the shipment could only occur at the office of the Ford receiving clerk. It cannot be the law that a consignee, by failing or refusing to accept goods, can thereby extend or broaden the coverage of the statute.

Additionally, the unlocked trailer was left on Ford premises and under Ford control after the tender was made, which itself is delivery. Petitioner's conviction is based upon the inconsistent position that the goods were *not* under Ford Motor Company control when left in the bullpen but that Petitioner, a Ford employee, had some duty not to permit that Shippers Dispatch trailer and load out of the Ford gate.

(b)

The Asportation Issue Was Incorrectly Decided

Unquestionably, on this record, the shipment was stolen pursuant to an agreement made between defendants Rimar and Witherite on the afternoon of April 16, 1974, without the knowledge of Petitioner and without any prearrangement with Petitioner. Petitioner submits that when Lloyd Witherite attached the Associated tractor to the Shippers Dispatch trailer with the intention and with the present ability to move the trailer, the goods were at that instant stolen within the meaning of 18 USC 659. *Every* prior decision under Sec. 659 or its predecessor section which considered the question has held that asportation is *not* an element of a Sec. 659 offense. See *U. S. v. DeNormand,* 149 F. 2d 622 (2nd Cir. 1945), certiorari denied 326 U. S. 756; *U. S. v. Padilla,* 374 F. 2d 782 (2nd Cir. 1967); *U. S. v. Douver,* 472 F. 2d 472 (9th Cir. 1973), certiorari denied 93 S. Ct. 1933, and *U. S. v. Green,* 446 F. 2d 1169 (5th Cir. 1971).

The District Court held that asportation is an element of a Sec. 659 offense relying on *U. S. v. Barlow,* 470 F. 2d 1245 (D. C. Cir. 1972), a case involving theft of Federal Government property under 18 USC 641.

Petitioner was charged only with the offense of aiding and abetting the commission of the theft. Obviously, and by definition, a party cannot aid and abet the commission of a completed offense. See *Roberts v. U. S.,* 416 F. 2d 1216 (5th Cir. 1969); *U. S. v. Ferraro,* 414 F. 2d 802, 804 (5th Cir. 1969); *U. S. v. Varelli,* 407 F. 2d 735, 749 (7th Cir. 1969). If the offense in this case was

complete when Mr. Witherite stole the trailer, and if asportation is not an element of the offense, then Petitioner could not have been guilty of the offense of aiding and abetting in the theft by his actions taken after Witherite had driven the stolen trailer for more than one mile.

This Court cannot condone a situation where the Government can obtain convictions under Sec. 659 by asserting in one case that asportation is an element of the offense and by asserting in another case that asportation is not an element of the offense.

(c)

The Arbitrary Discrimination of the Statute Denies Due Process of Law to This Petitioner

The last paragraph of 18 USC 659 provides in part:

> "A judgment of conviction or acquittal on the merits under the law of any state shall be a bar to any prosecution under this section for the same act or acts."

There is no provision therein that a conviction or acquittal under Sec. 659 shall be a bar to any subsequent State prosecution for the same act or acts.

Thus, the discrimination complained of is simply that some persons may be prosecuted under Sec. 659 and other persons, who may in fact have been engaged in the same act or acts, are immune from prosecution under Sec. 659. The immunity arises out of the fortuitous timing of the prosecution by the Federal authorities vis-a-vis the prosecution by the State authorities. Those prosecuted first by the Federal authorities can be subsequently prosecuted

by the affected State authorities. *U. S. v. Jackson,* C. A. Fla. 1972, 470 F. 2d 684. Certiorari denied 93 S. Ct. 3019, 412 U. S. 951, 37 L. Ed. 2d 1004. Those prosecuted first by the State authorities cannot subsequently be prosecuted under Sec. 659. Petitioner submits that there is no rational basis for permitting the prosecution of some persons by both State and Federal authorities while permitting the prosecution of others only by State authorities, simply based upon the order of the trials.

The foregoing argument is, of course, an equal protection argument, and while there is no federal equal protection clause, still it is well settled that "The power of Congress to discriminate is limited by this (Fifth Amendment due process) clause, which includes the principle of equal protection when a federal statute discriminates in an invidious manner or deprives persons of their fundamental constitutional rights." *Jimenz v. Richardson,* D. C. I., 1973, 353 F. Supp. 1356, probable jurisdiction 94 S. Ct. 567, 414 U. S. 1061, 38 L. Ed. 2d 467.

Although "the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process." *Johnson v. Robison,* 94 S. Ct. 1160 (1974). *Schneider v. Rusk,* 377 U. S. 163, 168, 84 S. Ct. 1187, 1190, 12 L. Ed. 2d 218; see *Frontiero v. Richardson,* 411 U. S. 677, 680 n. 5, 93 S. Ct. 1764, 1767, 36 L. Ed. 2d 583 (1973); *Shapiro v. Thompson,* 394 U. S 618, 641-642, 89 S. Ct. 1322, 1355, 22 L. Ed. 2d 600 (1969); *Bolling v. Sharpe,* 347 U. S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954). Thus, if a classification would be invalid under the Equal Protection Clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment.

See *Richardson v. Belcher,* 404 U. S. 78, 81, 92 S. Ct. 254, 257, 30 L. Ed. 2d 231 (1971).

This Court also held or stated, in *Johnson v. Robison,* supra, page 1169, that "a classification must be reasonable not arbitrary, must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia,* 253 U. S. 412, 415 (40 S. Ct. 560, 46 L. Ed. 989) (1920), *Reed v. Reed,* 404 U. S. 71, 75-76, 92 S. Ct. 251, 253, 30 L. Ed. 2d 225 (1971).

Defendant Barber submits that the test for prosecution under Sec. 659, i. e., whether or not a hearing has been had on the merits in state court, is not a "ground of difference having a fair and substantial relation to the object of the legislation," and that obviously not "all persons similarly circumstanced shall be treated alike" under the statute as written, and that the statute, 118 USCA 659 and 2, as applied to him is unconstitutional.

—o—

CONCLUSION

Petitioner requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

74-82717

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAVID SCHURGIN, STANLEY RIMAR, a/k/a Dale Rimar, JOHN JAMES CHILA, RUSSELL P. BARBER,
Defendants.

SESSION OF FRIDAY, JUNE 11, 1976

The Court: All right, gentlemen. I guess it's the government's job to proceed with argument.

(Closing arguments were made by counsel. Reported but not transcribed.)

The Court: Mr. Fink referred in his argument to the more important decisions in one's life. I will tell you the most important and most difficult decision in a trial judge's life is a decision in a non-jury trial on a circumstantial evidence case.

I don't want to prolong the agony and say too much and under the Court Rule I am not required to find facts specially but I think the parties, both government and defendant, deserve it and not only that it makes the

Court's reasoning more testable in the event of a conviction. Furthermore, I say this because it has happened, I have made favorable decisions to defendants in the course of making special fact findings even though the decision was to the contrary in the first place and, I don't believe, I think I should state my reasons for the decision the Court must make. The first thing, a storage facility: the interstate aspect commerce of it. There doesn't seem to be any real dispute—as far as the Court is concerned the government has not proved that Ford did not know the goods were on the premises. What does Ford know? It's a big company. If that were the controlling issue the decision would have to go against the government on that point.

The truck came through the gate, checked in through the gate. They have not proved it didn't happen and I am satisfied that it did happen. The truck driver brought the goods up. He got a pass. He brought the truck someplace, parked it temporarily, came up to a window or office, handed in some papers. I am satisfied there was somebody there. They weren't entered, the shift change, time, accident, plan, scheme, who knows. They were not entered on the books, on paper. The shipping clerk or whoever he was said, "We can't unload these things now. Go park it over here in the storage area." There isn't any fact question about it.

It was an arrangement—these are fact questions but I am satisfied they occurred and I am making findings of

fact they occurred. They made the arrangement with Shippers Dispatch—Shippers Dispatch had an arrangement with another trucking company for their convenience to move the goods up to the unloading dock to be unloaded. The fact that Ford had something to do with the selection of this other company, the fact that Shippers Dispatch, if they wanted to do business probably had to go along is irrelevant. I think that any way you twist it, no matter how persistent and my goodness, the arguments have been persistent, there isn't any possible way consistent with the undisputed facts that these goods were not still in interstate commerce under the law and within the meaning of the statute.

I think the government probably could have charged this case as being on a vehicle as well as being in a storage facility or charged in the alternative, it wouldn't make any difference. My reading of the statute is that Congress intended it to be rather all inclusive and while the goods were sitting on a trailer without being attached to a truck waiting to be unloaded, they were within the broad meaning of the word of a storage facility.

I have no problem whatsoever in saying that the government established by the undisputed evidence that these goods were in interstate commerce, they had not lost their interstate commerce capacity and were taken and carried away from a storage facility while they were still in interstate commerce.

What about Mr. Barber's participation? It's about as clear a case of aiding and abetting as you ever heard of and/or ever seen. There was no way they could get these goods outside the perimeter, effectively get them outsid the perimeter without the corruption of a Ford employee.

The fact he is a Ford employee doesn't mean they are not in interstate commerce. That was part of the physical structure there. They were still in interstate commerce when they came through the gate. They would have been in interstate commerce until they were backed up to that dock to unload. The fact that other people were far more involved in the sense of making more money doesn't change the fact that Mr. Barber turned his head. He had done it as a matter of course in the past, he turned his head the other way. It is no different than somebody unlocking a window to allow somebody else to break and enter or a guard to look the other way while a robbery is occurring.

Mr. Barber allowed himself to be corrupted in a way that he was indeed an aider and abettor of this interstate theft from a storage facility and it's the Court's decision that Mr. Barber stands convicted thereof.

APPENDIX B

Nos. 76-2327, 76-2328, 76-2329

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

STANLEY RIMAR, DAVID L. SCHURGIN, RUSSELL P. BARBER,
Defendants-Appellants.

Appeal From the United States District Court for the Eastern District of Michigan, Southern Division

Decided and Filed July 27, 1977.

Before: Edwards and Peck, Circuit Judges and Siler,* District Judge.

Peck, Circuit Judge. These defendants appeal their convictions under a two-count indictment for stealing and aiding and abetting in the theft of goods from interstate commerce, and for possession of goods knowing them to have been stolen from interstate commerce. The trial judge first determined that *Bruton v. United States,* 391 U. S. 123 (1968) required the severance of certain defendants. Thereafter, at a single trial, he sat as the trier

*Honorable Eugene E. Siler, Jr., United States District Court for the Eastern and Western Districts of Kentucky, sitting by designation.

of fact as to the defendants Barber and Schurgin who had waived jury trial, and empanelled two juries to hear the cases of defendants Rimar and Chila. Defendant-appellant Rimar was jury convicted on both counts of the indictment, but was sentenced to six years on the theft count only since the judge dismissed the possession count pursuant to this court's opinion in *United States v. Solimine*, 536 F. 2d 703 (6th Cir. 1976). Defendant-appellant Schurgin was found guilty by the trial judge of the possession count and sentenced to 18 months. Defendant-appellant Barber was found guilty of aiding and abetting in the theft and was sentenced to one year, all but 60 days suspended. Co-defendant Chila was acquitted by a jury of both counts. Co-defendant Lloyd Witherite pled guilty, received a two-year sentence under a Rule 11 plea bargain, and testified against the others at trial.

Evidence adduced at trial tended to establish the following. On April 16, 1974, Ernest Williams, a truck driver for the Shippers Dispatch Company, drove a Shippers Dispatch trailer, which originated in Chicago, Illinois, from a freight yard in Detroit, Michigan, to the Ford Assembly Plant in Dearborn, Michigan. Upon turning over the "pro bill," a document showing the contents of the trailer to be 18 pallets of 2880 air compressors, to the Ford receiving clerk, Williams was told that the compressors could not be unloaded at that time. He was asked to take the trailer and leave it in a parking area, known as the bull pen. Usual procedure at this point would be for a switcher (a driver representing an independent trucking firm and working within the Ford complex) to hook a tractor to the trailer and take it to the loading dock when Ford was ready to unload it.

Lloyd Witherite was working as a switcher at the Ford plant on April 16, 1974. He had a prior agreement with appellant Rimar, that Rimar would buy certain automobile parts that Witherite would steal. While checking through the freight bills that day, Witherite noticed the bill listing 18 pallets, 2880 air compressors. Witherite took the bill and subsequently telephoned Rimar, who agreed to buy the air compressors for the previously agreed upon price of $5.00 apiece (retail value was $26.18 each). Witherite also had an on-going agreement with appellant Barber, a security man at the plant gate, under which Barber would "look the other way" for a price. Witherite waited until Barber was on duty at the outgoing gate, then he hitched his tractor to the Shippers Dispatch trailer containing the air compressors, and drove to the outgoing gate. He warned Barber not to look too closely and Barber opened the door of the trailer slightly, then closed it quickly and allowed Witherite through. Witherite drove out of the Ford complex, parked the trailer at another Ford lot located outside the gate, and called Rimar to tell him where he could pick it up. Later that night Witherite met Rimar, who paid him $14,400.00 in cash for the air compressors. Witherite paid Barber $200.00 on the following day for his part in the theft.

In the early morning hours of April 17, Rimar appeared at the dock of Howard Metal and Salvage, Inc., and asked Fred Howard, the owner, to assist him in unloading the contents of a trailer and reloading those contents into another trailer. John Chila, Rimar's driver, then delivered this load to the Original Equipment Manufacturers (O. E. M.), owned by appellant Schurgin. Schur-

gin had, a day or two before, told his warehouse manager, Larry Zbizek, to expect a large shipment of air compressors. After arrival of the parts on April 17, the compressors were unloaded and moved into the warehouse, even though no paperwork accompanied the shipment. In accordance with the instructions of Schurgin, O. E. M. employees repackaged the compressors, removing the serial plates as they did so.

On May 14, four FBI agents, acting pursuant to information given to them by Chila, proceeded to the O. E. M. Company where they identified themselves and questioned Schurgin regarding the stolen compressors. Schurgin denied they were on the premises. The agents requested permission to search; Schurgin indicated he wanted to talk to his attorney, which he did by telephone. Schurgin returned and subsequently signed the consent to search form. The search was halted at one point, when Schurgin again indicated he wished to confer with his attorney, and did not resume until Schurgin's attorney arrived at the O. E. M. premises. The search produced 440 compressors and several serial plates matching those of the stolen goods. It was later determined that the remainder of the compressors had been sold by Schurgin to the Essex International Corporation, and were recovered therefrom.

Appellants present a number of issues, jointly and individually. The primary concern of this court after receiving the briefs and oral arguments of the parties, was whether the unusual procedure implemented in the district court of simultaneous prosecutions before two juries and the judge created an atmosphere so confusing as to deprive these appellants of a fair trial. A thorough review

of the record has revealed certain instances of confusion, some cited by the appellants, some not. Several of such instances were reflected by misstatements of the judge or defense counsel in referring to the attorneys or their clients by the wrong names, or confusing momentarily which jury was sitting in which case. Many of these confusing moments took place out of the presence of the juries. However, nowhere in the record do we find any continuing confusion, so pervasive as to render the trial unfair. The trial judge seemed very much aware of the potential for error inherent in the procedure and he moved cautiously in areas where the rights of particular defendants were or could have been involved. Hence the trial took somewhat longer than the nature of the charges might suggest was necessary. In instances where misstatements occurred, the district judge promptly corrected himself or the attorney involved and instructed the jury accordingly. As the Supreme Court has held: "A defendant is entitled to a fair trial but not a perfect one. . . . It is not unreasonable to conclude that in many cases the jury can and will follow the trial judge's instructions to disregard such [improperly submitted] information." *Bruton v. United States, supra,* 228 F. 2d at 135.

Additionally, we conclude that the district court's instructions to the jury as to the interstate commerce element of the crimes in question correctly stated the law of this circuit as formulated in *Winer v. United States,* 228 F. 2d 944 (6th Cir. 1956), and reiterated in *United States v. Yoppolo,* 435 F. 2d 625 (6th Cir. 1970). We further conclude that the district court's action in dismissing the possession count as to defendant Rimar, and sentencing

him solely upon the theft count, complied with this court's decision in *United States v. Solimine,* 536 F. 2d 703 (6th Cir. 1976). The remaining contentions of the appellants we conclude to be without merit.

The judgments of the district court are affirmed.